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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of:

Reexamination of the Comparative Standards) MM Docket No. 95-31
for Noncommercial Educational Applicants)

TO THE COMMISSION

PETITION FOR RECONSIDERATION

The Minority Media and Telecommunications Council ("MMTC"), pursuant to 47 C.F.R. §1.429, respectfully petitions for reconsideration of the Second Report and Order, 68 Fed. Reg. 26220 (May 15, 2003), FCC 03-44 (released April 10, 2003) ("Second R&O").^{1/} A motion for stay is being filed separately this date.

The rules plainly contain a major flaw: they allow an auction bidder to conceal from its opponents that it is actually not entitled to bidding credits it has claimed and has notified the public that it intends to deploy.

For more than two years, MMTC has tried in vain to secure a ruling on whether this major flaw in the broadcast auction rules has fatally weakened the Commission's only significant policy aimed at promoting minority broadcast ownership: the new entrant bidding credits. See Petition for Clarification in MM Docket No. 97-234 (filed April 19, 2001 and not yet ruled upon) ("Petition"); Comments of MMTC in MM Docket No. 95-31 (filed May 15, 2002) ("Comments"), both of which are incorporated by reference herein.

Since April, 2001, we have raised this issue repeatedly in meetings with the Bureau, the Office of General Counsel and each commissioner. In meetings with the Bureau and OGC, MMTC was advised that the issue raised in the Petition was more

^{1/} This Petition reflects the institutional views of MMTC and is not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors.

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appropriately raised by filing comments in MB Docket No. 95-31. We did that. No one had opposed the Petition, and in this docket no one opposed our Comments. Thus, imagine how astonished we were that the Second R&O contained no mention of our Comments, except to list MMTC in the Appendix as having filed them. Id. at 19, Appx. A. The Second R&O did not even state that the Commission would consider the matter in MM Docket No. 97-234, or in a separate order.

In light of the likely net adverse impact on minority ownership of the forthcoming Report and Order in the omnibus broadcast ownership proceeding, MB Docket 02-277, it is particularly urgent that the one significant minority ownership-promoting policy that is still on the books is not destroyed by gamesmanship and fraud. Allegations of gamesmanship (albeit overblown) were responsible for the loss of the tax certificate policy in 1995. Similar allegations have plagued the wireless auctions. Why would the Commission fail to act immediately to close the door on gamesmanship in broadcast auctions?

Here is how this gamesmanship would work: as the auction rules are written now, an applicant can claim new entrant bidding credits, deploy the credits in the auction against other applicants, and then, during or after the auction, quietly abandon the attributes that gave rise to those credits. Sometimes this will happen when inexperienced applicants realize, during the auction, that they must bring in additional investors to stay competitive as the bidding accelerates. However, in too many cases, applicants will scheme in advance to retain their diversification attributes only long enough to claim bidding credits. An applicant that does not plan ultimately to be structured as a new entrant can simply create a shell new-entrant structure, claim the bidding credits, and then, during the

auction, revert to its long-planned permanent structure. It could then quietly report that fact 30 days later, when the auction is over and the other applicants can do nothing about it. See Petition, pp. 3-8; Comments, pp. 1-3. No one would ever know, unless a whistleblower turns on its employer. Even then, a party claiming that an applicant committed fraud would lack standing to complain, since, according to the D.C. Circuit last week, a petitioner must make a showing of actual harm stemming from program service. See Rainbow/PUSH Coalition v. FCC, No. 02-1020 (D.C. Cir., June 10, 2003), Slip Op., pp. 10-11. Such a showing is impossible when challenging an auction bidder that has never offered any programming. Further, according to the Court, misrepresentations do not necessarily affect program service anyway. Id., pp. 9-10.

Can we expect gamesmanship in auctions? Such gamesmanship should have been unheard of in comparative hearings, where applicants underwent fierce cross-examination and faced disqualification if they cheated. Even so, the value of the spectrum prize was so tempting that about a third of comparative hearing applicants' proposals were rejected by ALJs as fraudulent or nongenuine. Broadcast auctions will be much worse, since auction applicants have virtually no transparency.

How does fraud harm honest bidders? Applicants who are genuinely entitled to bidding credits will be unaware that their opponents' claims of entitlement to bidding credits are no longer valid. The genuine bidders will have, at their disposal, only the publicly available information on the history, assets, attributable broadcast holdings and financial capabilities of their opponents. They won't know the hugely material fact that their opponents had secretly brought in new investors to game the system. Therefore, the bidding strategies of the genuine new

entrants will embed the erroneous assumption that their opponents are really other new entrants, just like themselves, dependent on bidding credits in order to prevail. Relying detrimentally on this false information, the genuine applicants will be harmed in three ways. First, they will waste resources bidding on allotments they cannot win. Second, they will overbid to win their desired allotments. Third, in a simultaneous multiple allotment auction, they will abandon their optimal allotments and pursue inferior ones that they would not have pursued had they enjoyed timely and accurate information on their opponents' entitlements to bidding credits.

When the Commission used comparative hearings, it adopted a "comparative downgrading" policy to avoid such abuse. See Petition, pp. 9-10 (citing authorities). It is a mystery why Commission would abandon this well-crafted anti-fraud provision.

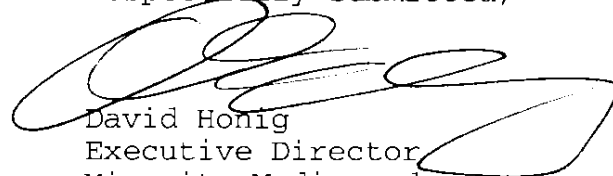
The remedy could not be simpler: immediate posting on the auction website of the loss of any attributes that entitled an applicants to bidding credits, and disgorgement of the value of any improvidently deployed bidding credits. Comments, p. 3. Auctions will feature next-day status reports on bidding, and the bidding credits system already contemplates post-auction payment adjustments. Thus, the burden on the Commission and on bidders of preventing auction gamesmanship is virtually zero.

To be sure, there may be other ways besides bidding credit gamesmanship that an applicant could miraculously find "new money" during an auction -- a well-timed inheritance, or hitting the Powerball, perhaps. Yet it seems virtually self evident that partial but accurate information about competing bidders' finances is preferable to partial and inaccurate information. No city

declines to build a library on the theory that it would be missing a few books.^{2/}

WHEREFORE, MMTC respectfully requests that the Second R&O be reconsidered as described herein.

Respectfully submitted,



David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@mmtconline.org

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^{2/} Nonetheless, in case a more rigorous explanation is required, two weeks ago MMTC issued an RFP to hire an expert in game theory. Thus far, no qualified expert has responded. Therefore, MMTC requests leave to supplement this Petition for Reconsideration, within a reasonable time, with a suitable expert declaration.